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No. 99-1502

IN THE
Supreme Court of the United States

AMOCO PRODUCTION COMPANY,
Petitioner,
v.
LOBO EXPLORATION COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals for the State of Oklahoma

REPLY BRIEF FOR PETITIONER

GARY W. DAVIS
MARK D. CHRISTIANSEN
CROWE & DUNLEVY
A Professional Corporation
1800 Mid-America Tower
20 North Broadway
Oklahoma City, OK 73102
(405) 235-7700

DAVID K. PETTY
P.O. Box 1187
305 West Fifth Street
Guymon, OK 73942
(580) 338-5484

CARTER G. PHILLIPS *
STEPHEN B. KINNAIRD
EDWARD R. MCNICHOLAS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

GARY L. PAULSON
MICHAEL L. HOMEYER
BP AMOCO CORPORATION
Law Department
501 WestLake Park Boulevard
Houston, TX 77079
(281) 366-3772

Counsel for Petitioner Amoco Production Company

* Counsel of Record

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REPLY BRIEF OF PETITIONER

In its petition, Amoco Production Company ("Amoco") demonstrated that review by this Court is necessary to clarify that *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), requires that proponents of nationwide class actions demonstrate the absence of significant conflicts of laws in order to obtain certification, and that the Oklahoma court's failure to require this demonstration violates due process of law and denies full faith and credit to the laws of the other States. Large companies such as Amoco have national operations and enter into transactions and contracts in many of the 50 states. If disputes arise from those transactions and contracts, they will typically be governed by the law of the state where the transactions transpired, the contracts were formed, or by the law selected by the parties. That is a central feature of this country's federal structure. Nationwide class-action plaintiffs like Respondent Lobo Exploration, however, misuse the class-action mechanism to ratchet-up the pressure on defendants by aggregating so many claims that even a relatively small risk of liability will provide unwarranted settlement pressure. This procedural device can effectively extinguish the substantive rights and duties of parties under different state laws, because litigation comes at too dear a price. Accordingly, the majority of courts (but not Oklahoma in the case below) have adopted a rule for class-action certification that protects the legal rights of parties and the full faith and credit to which the laws of the different States are entitled: namely, that the proponent of class-action certification bears the burden of proving that there are no conflicts of law that would destroy the predominance of common issues and render the class action hopelessly unmanageable. See Pet. 11 & n.3.

Respondent's brief in opposition attempts to obscure the Oklahoma court's central constitutional failure to vindicate the laws of other States and to protect Amoco's due process rights by quibbling over immaterial facts and misdirecting

this Court to irrelevant issues. Respondent indeed fails to mention the Oklahoma court's improper shifting of the burden of any choice of law analysis onto Amoco, largely ignores the express and varying choice of law provisions in many of the joint operating agreements at issue, misconstrues the due process norms articulated in *Shutts*, and addresses merely in a footnote this Court's recent affirmation of denial of class certification for similar reasons in *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997). Allowing certification of a nationwide class action in the circumstances present here fundamentally violates due process and denies full-faith-and-credit by, in essence, forcing Amoco to sacrifice its state law rights and to face unfair litigation against an amorphous grouping of diverse plaintiffs unified only by their ability to exert tremendous settlement pressures independent of the merits of their position.

1. Respondent devotes most of its brief to arguing the merits of the choice-of-law question: namely, whether Oklahoma law should govern. See Opp. 12-15. Its arguments are incorrect, but, more fundamentally, they are irrelevant at the petition stage. This Court generally grants certiorari only to resolve conflicts in the courts of appeals or state courts of last resort or to resolve "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). There can be no question that the constitutional rights of defendants in the certification of nationwide class actions are questions of paramount importance in today's world given the significance of the certification decision—a fact which respondent does not and cannot contest.[1] Moreover, the Oklahoma Court of Appeals

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[1] *See* Joseph A. Grundfest & Michael A. Perino, *Ten Things We Know and Ten Things We Don't Know About the Private Securities Litigation Reform Act of 1995*, 1015 PLI/Corp. 1015, 1027 (1997) (quoting a study that 87.6% of securities class actions filed from April 1988 through September 1996 ended in settlement); Thomas E. Willging et al., *An*

acknowledged the significant split of authority as to which party bears the burden of proof to show conflict of law at the certification stage. See Pet. App. 6a-7a. It is critical that this Court resolve this issue to ensure that diversity in state law and the rights of parties (including the vindication of contractual choice-of-law clauses) are respected, especially given the prevalence of forum-shopping by plaintiffs in this area of law.[2]

Empirical Analysis of Rule 23 to Address the Rulemaking Challenges, 71 N.Y.U. L. Rev. 74, 143 (1996) (noting that "certified class actions were two to five times more likely to settle than cases that contained class allegations but were never certified"); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 958 & nn.84-85 (1995) ("The certification of mass tort class actions . . . practically ensures that the litigation will be settled short of trial."); Susan P. Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 Cornell L. Rev. 1045 (1995) (attacking collusive settlement conduct and its effects on the plaintiffs); Janet Cooper Alexander, *Do The Merits Matter? A Study Of Settlements In Securities Class Actions*, 43 Stan. L. Rev. 497, 517-17 (1991) (suggesting that class action rules result in a non-merits-based settlement regime in which securities fraud class actions typically settle for roughly between 20-27% of the amount at stake in the case); *see also, e.g.*, Lucian Arye Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. Legal Stud. 437 (1988); Avery Katz, *The Effect of Frivolous Lawsuits on the Settlement of Litigation*, 10 Int'l Rev. L. & Econ. 3 (1990); David Rosenberg & Steven A. Shavell, *A Model in Which Suits Are Brought for Their Nuisance Value*, 5 Int'l Rev. L. & Econ. 3 (1985).

[2] Respondent also devotes several pages to arguing that irrelevant factual issues were presented "in a false light" by Amoco's petition. Opp. 5, 8-9. Amoco's factual representations were entirely accurate, but they were offered principally as background to an entirely legal due process issue. For instance, Respondent contends that the 250 audits–which they concede were performed–were conducted primarily by a subset of the class and that the information provided in each audit in fact varied. *Id.* at 8-9. Amoco never stated otherwise, but the identity of which parties conducted the audits and the unquestionable reality that the disclosures made varied with the questions asked do not mitigate the Oklahoma

2. Respondent cannot refute that *Shutts* held that due process requires that a state have "significant contact[s] or . . . aggregation[s] of contacts" to the claims asserted by the class. 472 U.S. at 818. And although Respondent attacks a straw-man-argument that they need not "prove all of the possible laws that could apply," Opp. 18-19, it is part of its burden to demonstrate such contacts between the allegations and the proposed law so as to afford due process in the application of that law. See Pet. 9-11 & n.3.

The Oklahoma court simply failed to conduct the appropriate analysis of the connections between Oklahoma law with the claims asserted. Indeed, the Oklahoma courts expressly shifted the burden to demonstrate such contacts onto Amoco and thereby removed it from the proponent's burden of proof at the certification stage. Pet. App. 54a-55a. Respondent, in reference to what they deem a "most glaring misstatement[]" by Amoco , Opp. 10, does refer this Court to the Oklahoma decisions but can cite merely to an analysis of *Amoco's* contacts with the forum, not *Oklahoma's* contacts with the claims presented. Indeed, Respondent's brief omits the first sentence of the Oklahoma court's findings which make it clear that the court was analyzing "Amoco's contacts with the State of Oklahoma." Pet. App. 51a.

In *Shutts* itself, this Court expressly warned against precisely this kind of bootstrapping of a defendant's contacts (necessary for personal jurisdiction) into a due process analysis:

> The issue of personal jurisdiction over plaintiffs in a class action is entirely distinct from the question of the constitutional limitations on choice of law; the latter calculus is not altered by the fact that it may be more

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court's central failure to perform the requisite *Shutts* analysis. Indeed, these facts merely highlight the vast underlying variances in the class certified.

> difficult or more burdensome to comply with the constitutional limitations because of the large number of transactions which the State proposes to adjudicate and which have little connection with the forum.

472 U.S. at 821. At no point did the Oklahoma court engage in the *Shutts* inquiry concerning connections between absent class members and Oklahoma, beyond noting that objecting absent class members may opt out. Pet App. 52a.[3]

No dispute exists that hundreds of the joint operating agreements at issue expressly designate governing law other than Oklahoma's law. Consistent with industry practice, the law selected was most often the law of the *situs* of the well and the law on which the Working-Interest Owner most likely relied in making that agreement. The Oklahoma court's conception of choice of law would apply Oklahoma law to an agreement concerning wells outside Oklahoma, owned by people outside of Oklahoma, and which expressly selects a different law, despite the demonstrated, substantive variances in the applicable law, see Pet. 14-16, nn.4-7. Choice-of-law clauses (particularly those negotiated by sophisticated commercial enterprises) should be enforced absent fraud, fundamental unfairness, violation of public policy, or unequal bargaining power, none of which is claimed here. See *Spinozzi* v. *ITT Sheraton Corp.*, 174 F.3d 842, 845-46 (7th Cir., 1999) (Posner, J.); cf., *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 593-95 (1991) (forum-selection clauses). The existence of these clauses is a significant factor in determining whether the forum state has sufficient contacts to justify uniform application of forum law in a nationwide class action, but it is wholly overlooked both in the opinion of the Oklahoma Court of Appeals and in respondent's brief in

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[3] *Compare Shutts*, 472 U.S. at 820 ("We . . . give little credence to the idea that Kansas law should apply to all claims because the plaintiffs, by failing to opt out, evidenced their desire to be bound by Kansas law.").

opposition. Indeed none of Respondent's authorities, Opp. 13 nn.37-38, are relevant because none apparently involved a choice-of-law clause.

Respondent rightly points out that commonality of law is not the only factor that may justify a class action, Opp. 16-17, but it misses the fundamental point that for nationwide class actions the prerequisites of class action certification—the *predominance* of common issues of law and fact, and the *superiority* of the class action mechanism—can only be determined by a threshold analysis to show that disparities in state law are not so extensive as to outweigh any common questions of fact or to render the class unmanageable. See *Castano* v. *American Tobacco Co.*, 84 F.3d 734, 740 (5th Cir. 1996); *Walsh* v. *Ford Motor Co.*, 807 F.2d 1000, 1017 (D.C. Cir. 1986). Lobo's argument that a trial court could always decertify or modify the class, or create subclasses, at a *later* stage is unavailing. The fundamental point is that there generally will be no later stages of litigation; improper certification in derogation of individual due process rights and the laws of other states will often end the matter, because a defendant cannot bear the risks and cost of mass-liability litigation of this kind.

Respondent's contentions that due process does not *prohibit* the application of Oklahoma law to a nationwide class, Opp. 12-14, and its conclusion that Rule 23 does not limit the geographic scope of a class action, *id.* at 21, are likewise irrelevant to the issue of whether a trial court must analyze whether the proponent of a class has proved that a manageable class does in fact exist. Due process norms most certainly are not biased against Oklahoma law, and Amoco makes no challenge to the geographic scope of this action per se. Rather, the due process that Petitioner Amoco seeks and which *Shutts* requires is a largely procedural right to be free of the burden of litigating against an amorphous class when the proponent of class certification has been relieved of its

duty to demonstrate the absence of relevant conflicts of laws, especially when that analysis has utterly dismissed the written agreement of the parties.

3. Given the procedural nature of the claims at issue, the decision of the Oklahoma court is effectively final so that jurisdiction is proper under the seminal teachings of *Cox Broadcasting Corp.* v. *Cohen*, 420 U.S. 469 (1975). In *Cox*, this Court recapitulated legions of cases in which it has reviewed judgments in cases "in which there are further proceedings—even entire trials—yet to occur in the state courts but where for one reason or another the federal issue is conclusive or *the outcome of further proceedings preordained*." *Id.* at 479 (emphasis added). Nothing in this Court's jurisprudence has indicated that *Cox* lacks continuing vitality as the means of protecting this Court's ability to preserve rights not to be subjected to improper procedures, like the ones present here.

Due process rights like the ones at issue have traditionally been recognized as falling comfortably within the *Cox* categories. The vindication in *Shaffer* v. *Heitner*, 433 U.S. 186, 195 n.12 (1977), of a right not to be forced to defend an action on the merits when jurisdiction was grounded solely on an improper seizure of property could hardly have been accomplished if the improper trial had to be conducted in order to seek the review of this Court. Likewise, protection against undue assertions of personal jurisdiction, as in *Calder* v. *Jones*, 465 U.S. 783, 788 n.8 (1984), would be significantly diminished if one had to undergo the defective procedures in order to challenge them. See also *Pennsylvania* v. *Ritchie*, 480 U.S. 39, 47-50 (1987) (Sixth Amendment rights); *Southland Corp.* v. *Keating*, 465 U.S. 1, 7 (1984) (arbitration preemption), *Rush* v. *Savchuck*, 444 U.S. 320, 324 (1980) (*quasi in rem* jurisdiction). The constitutional right to have legal claims adjudicated under the law of a state with sufficient contacts to the claim can only be vindicated

before having to face the pressures for settlement with a class entity that should not exist. Cf. *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 152-53 (1967) (finding administrative finality when the alternative to compliance was the risk of prosecution or civil penalties). To hold otherwise would allow an unfair procedure to dictate the substantive outcome and would require exceptional circumstances for the key issues confronting class actions to come to this Court's attention.

Numerous federal courts of appeal have recognized that the discrete issue of class certification effectively forecloses further review because of the incredible risk that a nationwide company faces regardless of the merit of the plaintiff's claims. See, *e.g.*, *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1297 (7th Cir. 1995); *Parkinson* v. *April Indus., Inc.*, 520 F.2d 650, 653-54 (2d Cir. 1975). As Judge Easterbrook recently noted, "[c]lass certifications . . . have induced judges to remake some substantive doctrine in order to render the litigation manageable. This interaction of procedure with the merits justifies an earlier appellate look." *Blair* v. *Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999) (citation omitted). Respondents offer no answer to these concerns beyond unfounded claims about piecemeal litigation, Opp. 4, that do not reflect the realities of the effects of a class certification.

Relying primarily on the one-sentence opinion in *Gillette Co.* v. *Miner*, 459 U.S. 86 (1982) (per curiam), Respondent incorrectly asserts that this Court has dismissed petitions for want of jurisdiction in cases similar to this one. Opp. at 2. The *per curiam* decision in *Gillette* does not explain its determination within the facts of that case and does not even purport to announce any rule of law having future application. Significantly, the due process issue in *Gillette* was the rights of the non-party plaintiffs. See *Miner* v. *Gillette Co.*, 428 N.E.2d 478, 482 (Ill. 1981). Certification accordingly presented no issues of finality because the plaintiff could also

withdraw and did not face the massive pressure that often forces defendants to submit to settlements. Nothing in *Gillette* withdraws this Court's jurisdiction to review decisions that effectively determine federal issues or undermines the practical approach to finality articulated in *Cox* and its progeny.

Respondent's other authorities are likewise without force. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942) (per curiam) and *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69 (1946), stand merely for the proposition that it is the practical realities of a decision, and not the niceties of local practice, that control the finality determination. In *Pink*, this Court rejected reliance on New York practices with respect to the court with which the record was physically lodged. 317 U.S. at 268. Similarly, in *Richfield Oil Corp.*, this Court considered California rules concerning new trials, not to determine whether a decision was sufficiently final. 329 U.S. at 72-73. As this Court stated in *Market Street Railway* v. *Railroad Commission*, 324 U.S. 548, 552 (1945) with respect to finality, "[o]ur test is a practical one." See also *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 171 (1974) (noting the "'practical rather than a technical construction'" of the finality requirement). Petitioner does not rely upon Oklahoma's allowance of an interlocutory review as some talisman of local practice but rather as a further legislative indication of the effective finality and unrefuted significance of the class certification decision.

This Court's decision in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978), should likewise not be controlling. In *Coopers & Lybrand*, this Court rejected the "death knell" doctrine because of concerns that courts would be forced to engage in the "legislative, not . . . judicial, function" of deciding which cases merited immediate review and could allow "*indiscriminate* interlocutory review." *Id.* at 472-74.

The amendments to Fed. R. Civ. P. 23 have, however, addressed these concerns by authorizing interlocutory review of certifications in certain circumstances. These amendments have eliminated the concerns cited by this Court in rejecting the "death knell" doctrine for plaintiffs. As the Committee Notes to the new Subdivision (f) make clear, the rationale for these amendments indeed reflects the precise concerns present here:

> An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability. These concerns can be met at low cost by establishing in the court of appeals a discretionary power to grant interlocutory review in cases that show appeal-worthy certification issues.

Fed. R. Civ. P. 23(f) Advisory Comm. Notes. In light of this new federal regime as well as the similar judgment of the Oklahoma legislature that review is appropriate, fairness and conservation of judicial resources argue for consideration of constitutional certification issues even on interlocutory appeal.

Given the importance of class action certification and the conflicting authorities regarding the burden of proving manageable choice of law issues, this Court should not hesitate in asserting jurisdiction to correct the constitutionally deficient certification procedures employed in this case.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

GARY W. DAVIS
MARK D. CHRISTIANSEN
CROWE & DUNLEVY
A Professional Corporation
1800 Mid-America Tower
20 North Broadway
Oklahoma City, OK 73102
(405) 235-7700

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
EDWARD R. MCNICHOLAS
SIDLEY & AUSTIN
1722 Eye Street, N.W.
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(202)736-8000

DAVID K. PETTY
P.O. Box 1187
305 West Fifth Street
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(580) 338-5484

GARY L. PAULSON
MICHAEL L. HOMEYER
BP AMOCO CORPORATION
Law Department
501 WestLake Park Blvd.
Houston, TX 77079
(281) 366-3772

Counsel for Petitioner Amoco Production Company

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*Counsel of Record